The International Criminal Court Statute: An Appraisal of the Rome Package

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I. Introduction

As the final hours of the Rome Diplomatic Conference approached there were no more illusions, just an unbearable feeling of anxiety. Knowing that every outcome was still possible, NGO representatives paced the halls waiting for the release of the last and most important part of the International Criminal Court (ICC or Court) Statute.[1] What would the final "package" contain? Would it enable the creation of an independent, effective and fair Court that the Lawyers Committee for Human Rights and hundreds of other organizations[2] had lobbied so hard for? What would we do if it didn't?

Several months later, the answers to the agonizing questions that raced through many heads in the pre-dawn light of July 17, 1998, can be offered more calmly and more thoughtfully. There is more time to look back at NGO's expectations going into Rome and to objectively assess the extent to which they were met. With the advantage of hindsight we can evaluate the contribution of NGOs to the creation of an ICC. Most importantly, we can point to what still needs to be done to ensure that the Court becomes a truly effective

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1. *See* Rome Statute of the International Criminal Court, 37 I.L.M. 999, U.N. Doc. A/CONF.183/9 (July 17, 1998). Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court [hereinafter ICC Statute or Rome Statute or Rome Treaty].

2. The NGO Coalition for an International Criminal Court (CICC) was created in 1995 by a handful of international NGOs and grew to number some 800 organizations from all regions of the world by the start of the Rome Diplomatic Conference. It has a ten-member Steering Committee composed of Amnesty International, European Law Students Association, Federation Internationale des Ligues des Droits de l'Homme, Human Rights Watch, International Commission of Jurists, Lawyers Committee for Human Rights, No Peace Without Justice (TRP), Parliamentarians for Global Action, Women's Caucus for Gender Justice in the ICC, and the World Federalist Movement. A total of 236 NGOs were accredited to the Rome Conference. The Coalition included many regional and sectoral caucuses. At Rome, Coalition members were divided into 12 teams monitoring the negotiations on different parts of the draft statute. For a comprehensive review of NGO activities, see the CICC (visited Sept. 1, 1999) <http://www.igc.apc.org/icc>.

instrument in the struggle to end impunity for international crimes. This paper will attempt to briefly address some of these issues. The first part will provide a summary of the basic principles underlying the lobbying efforts of the Lawyers Committee and other NGOs before and at the start of the Diplomatic Conference.[3] The second part will examine the strengths and weaknesses of the Rome Statute and explain the ICC "package." The third and final part will indicate some long-term improvements that need to be made to the ICC Statute to fully guarantee the Court's effectiveness.

II. Basic Principles for an Independent and Effective Court

Throughout the three and a half years of Ad Hoc[4] and Preparatory Committee[5] work leading up to the Rome Diplomatic Conference, the purpose of NGO efforts was to ensure the establishment of an "independent, effective and fair"[6] ICC. While this aim, and description, may appear self-evident, the initial text of the draft ICC Statute, finalized by the International Law Commission (ILC) in 1994,[7] left much to be desired. In many crucial aspects it envisaged the creation of a politically directed permanent ad hoc tribunal rather than the establishment of a permanent ICC. The ILC's draft lacked a definition of the crimes that were to be included in the Court's jurisdiction, there was no provision for automatic jurisdiction other than for genocide once a state became a party to the Statute, the ICC prosecutor could not initiate proceedings on his or her own motion, and the Security Council was granted veto power over ICC action. There were also no provisions on a mechanism to ensure compliance with the Court's decisions and no mention of the specific needs of women as victims of crimes, to mention just a few of the draft's faults. It was clear that substantial changes in the ILC text were needed if the ICC was to become an effective instrument in prosecuting and deterring serious international crimes. The role of NGOs throughout the ICC process was to influence the drafting work in order to achieve that end.

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3. The basic principles outlined in this review are those that were adopted by the Lawyers Committee for Human Rights in May 1998. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, BASIC PRINCIPLES FOR AN INDEPENDENT AND EFFECTIVE INTERNATIONAL CRIMINAL COURT (May 1998) [hereinafter BASIC PRINCIPLES]. For other Lawyers Committee briefing papers on the ICC issued before and after the Rome Conference, *see* (visited Sept. 1, 1999) <http://www.lchr.org>. Documents enunciating basic principles on the ICC were adopted by other individual members of the NGO Coalition Steering Committee and by the Steering Committee as a whole. Substantively, they reflect similar positions on the main issues.

4. An Ad Hoc Committee on the Establishment of an International Criminal Court, open to all U.N. member states, had been set up by the U.N. General Assembly in 1994 to discuss the ILC Draft Statute (*see infra* note 8). It held two sessions in 1995 and had no negotiating authority. *See Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, at 49, U.N. Doc. A/50/22 (1995).

5. The Preparatory Committee on the Establishment of an International Criminal Court, also open to all U.N. member states, was first convened in 1996 and held six sessions, totaling 14 weeks of work, through March and April 1998. As opposed to the Ad Hoc Committee, it was specifically charged with "preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries." *See Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, Vol. I, at 1, U.N. Doc. A/51/22 (1996) [hereinafter *Preparatory Committee Report I*].

6. BASIC PRINCIPLES, *supra* note 3, at 1.

7. *See Report of the International Law Commission on the Work of Its Forty-Sixth Session, Draft Statute for an International Criminal Court*, May 2–July 22, 1994, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994) [hereinafter *ILC Draft Statute*].

By April 1998, when the final Preparatory Committee session was concluded, the text of the Draft Statute had increased to 116 articles from the initial sixty provided for in the ILC draft.[8] The text contained some 1,700 brackets indicating opposing views about the inclusion of practically every provision in the ILC Draft Statute. Most importantly, several political and legal issues of crucial bearing on the future Court's functioning were still unresolved.[9] The success of the Diplomatic Conference depended on whether a compromise on this so-called "package" and its elements could be reached at Rome.

In order to reinforce and assist states committed to the creation of an independent and effective Court,[10] the Lawyers Committee enunciated the set of basic principles that had guided its work throughout the ICC process. Issued before the start of the Rome Diplomatic Conference, the basic principles reflected the Lawyers Committee's position on the key unresolved issues in the Draft Statute.

The first principle was that the ICC's jurisdiction should initially be limited to three "core" crimes: genocide, war crimes, and crimes against humanity. While the inclusion of genocide was undisputed throughout the ICC process,[11] it was by no means certain that war crimes committed in non-international armed conflict, so intimately connected with notions of sovereignty, would also be incorporated.[12] Crimes against humanity presented an equally daunting problem because of the lack of an internationally agreed definition.[13] Many states disputed the proposition that they could be committed in peacetime[14] and insisted that crimes against humanity be defined as acts committed on a "widespread *and* systematic basis" (instead of "*or* systematic basis") against a civilian population.[15] The Lawyers Committee argued that not including war crimes committed in civil strife would defeat the very purpose of the ICC given the prevalence of this type of conflict today. The notion that crimes against humanity had to be linked to armed conflict or that such acts had to be both widespread and systematic to qualify as crimes against humanity was also rejected as out of touch with current norms of international law. Along with certain other NGOs, the Lawyers Committee argued that the Rome Statute should include other crimes if agreement on their definition could be reached at the Diplomatic Conference.[16]

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8. *See Report of the Preparatory Committee on the Establishment of an International Criminal Court: Draft Statute for the International Criminal Court*, U.N. Doc. A/CONF.183/2/Add.1 (1998) [hereinafter *April 1998 Draft Statute*].

9. Most of these issues were clustered in part 2 of the Draft Statute entitled: "Jurisdiction, Admissibility and Applicable Law." It was the release of this part of the Statute that was anxiously awaited in the early morning hours of July 17, 1998.

10. The group of so-called "like-minded" countries working towards the establishment of an independent and effective ICC numbered almost 60 by the end of the Rome Conference. No official tally of these states was ever issued.

11. *See, e.g., Preparatory Committee Report I, supra* note 5, at 17.

12. *See id.* at 20.

13. *See id.* at 21.

14. *See id.* at 23.

15. *See id.* at 22 (emphasis added). For specific drafting proposals, see also *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, Vol. II, at 65, U.N. Doc. A/51/22 (1996) [hereinafter *Preparatory Committee Report II*].

16. This is, in particular, a reference to the crime of aggression. Its inclusion within the Court's jurisdiction was very controversial during the ICC process, due to the fact that this crime is most closely linked to acts of state. Drafting work was also hampered by disagreements on the role of the Security Council in determining that aggression has occurred and by the lack of an internationally accepted definition for the purposes of determining individual criminal responsibility for aggression. While some NGOs, including the Lawyers Com-

The second principle was that the ICC should have automatic jurisdiction over the three core crimes once a state ratifies the ICC Statute. The drafters of the ILC Draft Statute had devised an elaborate state consent regime under which the consent of a state party to the Statute would have to be given in each specific case before the Court could proceed.[17] (The exception was proceedings initiated by the Security Council, which would not require the consent of any state, whether party to the Statute or not.[18]) The Lawyers Committee's position was that a state consent regime would, in practice, render the Court ineffective in punishing and deterring most crimes because states parties could be expected to withhold consent to ICC proceedings if they determined that it was in their interest to do so. In addition, the Lawyers Committee lobbied hard for the proposition that the Court should be granted universal jurisdiction over the three core crimes, similar to that enjoyed by any state under current international law with respect to persons suspected of having committed genocide, war crimes or crimes against humanity.

The power of the ICC Prosecutor to initiate proceedings on his or her own motion (*proprio motu*) was the third basic principle of fundamental importance to the Court's independence and effectiveness. The ILC Draft Statute did not provide for *proprio motu* powers, relying only on the Security Council and states parties to initiate proceedings.[19] Having in mind the supremely political nature of these bodies and the fact that political considerations might prevent them from triggering the Court's jurisdiction, the Lawyers Committee insisted that the Prosecutor also be empowered to independently open investigations based on information from any source.

Under the ILC Draft Statute, the ICC would have had to seek Security Council permission before initiating an investigation in any case arising from a situation that was being dealt with by the Security Council under Chapter VII of the U.N. Charter.[20] Having in mind that threats to the peace or breaches of the peace are precisely situations in which crimes within the Court's jurisdiction are likely to occur, it seemed fairly obvious that the ILC's approach would have allowed the Security Council full control over the Court's docket. Neither the International Court of Justice nor national courts are under a similar constraint. The fourth basic principle was that the ICC should be able to proceed without interference from the Security Council or any other political body.

The fifth basic principle was that the ICC Statute must include explicit provisions on crimes of sexual and gender violence, as well as provisions on the protection of children, and should incorporate legal principles and procedures for prosecuting such crimes. In addition, it should provide for redress to victims of crimes within the Court's jurisdiction and ensure adequate protection for victims and witnesses. Apart from a reference to the latter,[21] the ILC Draft Statute lacked such provisions.

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mittee, did not favor the inclusion of aggression at this stage for fear that definitional debates might delay the adoption of the Statute, other organizations supported it. As is well known, aggression was included in the Rome Statute but remains undefined. Until that is done and other conditions are met, the Court will not exercise jurisdiction over the crime of aggression. *See* Rome Statute, *supra* note 1, art. 5.

17. *See ILC Draft Statute*, *supra* note 7, arts. 21–22 and accompanying commentary, at 79–84.
18. *See id.* art. 23(1) and accompanying commentary, at 84–85.
19. *See id.* arts. 23(1), 25.
20. *See id.* art. 23(3).
21. *See id.* art. 43.

In order to operate effectively, the ICC will have to rely on state cooperation in the conduct of investigations and prosecutions.[22] The obligation of states parties to fully cooperate with the ICC at all stages of the proceedings and the inclusion of a mechanism for dealing with noncompliance was the sixth basic principle. The Lawyers Committee believed that the ICC Statute must recognize the *sui generis* nature of state party cooperation with an international judicial body and resist the temptation to model the cooperation regime after bilateral treaties on mutual legal assistance or extradition. While the latter may, for example, include provisions permitting a requested state to deny information or the transfer of a suspect to another state, both the need for ICC effectiveness and the gravity of the crimes concerned point to the need for mandatory state party compliance with ICC requests.

Last, but by no means least, the Lawyers Committee insisted that the ICC must adhere to the highest international standards of fair trial and due process. Along with punishing and deterring serious international crimes, the Court is meant to act as a standard setting institution in the area of international criminal justice and to provide a model for domestic courts in the interpretation and application of fair trial norms. The Court must be structured to enable the scrupulous application of these standards if justice is to be done and to be seen as being done.[23]

III. The Rome Statute

The ICC Statute, as finally adopted, is a carefully balanced text that succeeded in satisfying the many political interests that were at play in Rome. When the text as a whole was put to a vote, a majority of 120 states voted in favor, twenty-one abstained and only seven countries, including the United States, voted against.[24] Interestingly, the very reason for the negative U.S. vote—the provisions on preconditions to the exercise of the Court's jurisdiction—was also the greatest cause of NGO discontent. While the United States claimed that those provisions were too broad, NGOs assessed them as restrictive to the point of seriously undermining the ICC's effectiveness. On balance, however, the NGOs concluded that the ICC Statute did establish a universal framework to end impunity for serious international crimes and that it deserved to be supported. Even though the final text of the Statute did not meet all of their expectations, it included many important elements advocated by those who worked for the creation of an independent and effective Court.

NGO support for the ICC Statute was based on two other considerations: the realization that the prospect of creating a permanent ICC might be indefinitely delayed if the Rome Conference was to fail, and a determination to work to improve the ICC Statute in the years ahead. The main elements of the package adopted at Rome, following the sequence of the Lawyers Committee's basic principles for an independent and effective Court, are outlined below.

22. *See id.* International Cooperation and Judicial Assistance, at 129–38.

23. As opposed to the other basic principles, which were very controversial from the start of the ICC process, the proposition that the ICC Statute must ensure fair trial rights was never in dispute. Given that fair trial norms will be elaborated in the Court's Rules of Procedure and Evidence, this specific principle will not be further discussed.

24. *See* Elizabeth Neaffer, *War Crimes Tribunal Adopted as U.S. Votes "No,"* Boston Globe, July 18, 1998, at A9.

A. Definition of Crimes

The Rome Statute provides that the Court will have jurisdiction over genocide, war crimes, crimes against humanity, and aggression.[25] It specifies that the three core crimes are defined only "for the purpose of this Statute,"[26] and that the definitions shall not be "interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."[27] The definition of "genocide"[28] is identical to that contained in the 1948 Genocide Convention:[29]

> Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) [k]illing members of the group; (b) [c]ausing serious bodily or mental harm to members of the group; (c) [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) [i]mposing measures intended to prevent births within the group; (e) [f]orcibly transferring children of the group to another group.

The inclusion of genocide in the ICC Statute was undisputed due to the undoubtedly serious nature of this crime and the existence of a long-standing treaty-based definition. Initial attempts to broaden its scope to include political and social groups[30] were unsuccessful because of an unwillingness to tamper with well-established law and a recognition that attacks on political and social groups could be dealt with as a crime against humanity.

Contrary to initial fears about the possible exclusion of crimes committed in internal strife, the ICC will have jurisdiction over war crimes committed in both international and noninternational armed conflict. Pursuant to article 8 of the ICC Statute, "war crimes" include grave breaches of the 1949 Geneva Conventions,[31] other serious violations of the laws and customs applicable in international armed conflict, serious violations of article 3 common to the Geneva Conventions relating to noninternational armed conflict and other serious violations of the laws and customs applicable to armed conflict not of an international character.

While the list of grave breaches was never contested, parts of the enumeration of twenty-six other acts, included in the ICC Statute as serious violations of the laws and customs applicable in international conflict, were vigorously debated.[32] As could be expected, the text reflects both advances and setbacks to existing law. For example, rape, sexual slavery,

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25. *See ILC Draft Statute*, *supra* note 7, art. 5. For a brief reference to the crime of aggression, which will not be mentioned further in this text, see *supra* note 17.

26. *Id.* art. 6 (genocide), art. 7(1) (crimes against humanity), art. 8(2) (war crimes).

27. *Id.* art. 10.

28. *Id.* art. 6.

29. Convention for the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, 78 U.N.T.S. 277.

30. *See Preparatory Committee Report I*, *supra* note 5, at 15–16.

31. *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), Aug. 12, 1949, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), Aug. 12, 1949, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), Aug. 12, 1949, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), Aug. 12, 1949, 75 U.N.T.S. 287.

32. The list is, *inter alia*, based on provisions of Protocol I to the Geneva Conventions and on norms of customary law provided for in the 1907 Hague Convention IV and the Hague Regulations. *See* Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Inter-

enforced prostitution, forced pregnancy, enforced sterilization "or any other form of sexual violence also constituting a grave breach of the Geneva Conventions" are explicitly provided for as war crimes in international conflict for the first time.[33] Similarly, in a victory for children's rights, the ICC Statute prohibits the "conscripting or enlisting of children under the age of fifteen years into the national armed forces or using them to actively participate in hostilities."[34] On the other hand, the well-established language of Protocol I prohibiting the launching of indiscriminate attacks against the civilian population or civilian objects was modified to make it more difficult for the Court to exercise jurisdiction over this crime.[35] Due to vehement political disagreement, the list of weapons that may not be used in international armed conflict was shortened so that it does not even include the employment of chemical and biological weapons.[36]

The inclusion of crimes committed in internal armed conflict within ICC jurisdiction is a significant achievement of the Rome Statute. While common article 3 to the Geneva Conventions and Protocol II to those Conventions[37] prohibit certain acts when committed in noninternational armed conflict, the Statute is the first international treaty that explicitly attaches individual criminal responsibility to such acts.[38] The ICC Statute incorporates the provisions of common article 3 (albeit with the unnecessary qualification that violations of common article 3 must be "serious," which is not contained in the Geneva Conventions), and also penalizes "[o]ther serious violations of the laws and customs applicable" in noninternational armed conflict.[39] The list of twelve violations includes, among others, intentional attacks against the civilian population or against individual civilians, intentional attacks against the facilities or personnel using the emblems of the Geneva Conventions, intentional attacks against the staff or facilities of humanitarian assistance or peacekeeping missions, crimes of sexual and gender violence as described above, and the displacement of the civilian population for reasons related to the conflict unless their security or imperative

national Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3. *See also* Convention Respecting the Laws and Customs of War on Land (Hague, IV) and Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

33. ICC Statute, *supra* note 1, art. 8(2)(b)(xxii).

34. *Id.* art. 8(2)(b)(xxvi). The same acts are provided for as war crimes in internal armed conflict, except that the prohibition pertains to conscripting or enlisting children "into armed forces or groups." *Id.* art. 8(2)(e)(vii). It is unfortunate that the ICC Statute did not increase the age limit to 18 years.

35. The ICC Statute in art. 8(2)(b)(iv) penalizes: "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated." Article 85(3)(b) of Protocol I, which refers to article 57(2)(a)(iii), does not contain qualifiers such as "intentionally," "clearly" or "overall," and thus permits a less restrictive interpretation.

36. Compare article 5(B)(b) of the April 1998 Draft Statute under the heading "War Crimes" on pages 15–16 and article 8(2)(b)(xx) of the Rome Statute. While there was never any chance, due to opposition from the established nuclear powers, to prohibit the use of nuclear weapons, it is unfortunate that the use of antipersonnel mines was not included in the ICC Statute.

37. *See* Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Noninternational Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609.

38. The Statute of the International Criminal Tribunal for Rwanda, which in article 4 penalizes certain acts committed in internal armed conflict, is not an international treaty. *See* S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994) [hereinafter Rwanda Tribunal Statute].

39. ICC Statute, *supra* note 1, art. 8(2)(c)-(e).

military reasons demand it. There is no doubt that the enumeration of war crimes committed in internal armed conflict could have been more comprehensive and that some egregious acts—such as starvation of civilians as a method of warfare—were omitted from the text.[40] Nevertheless, after the adoption of the Rome Statute it will be impossible to defend the proposition that crimes perpetrated in civil strife are an internal matter of the state in whose territory they occur. If they can give rise to international criminal responsibility then such a claim is no longer legally tenable.

It should be noted that the inclusion of the war crimes provisions in the Rome Statute did not come without two price tags. First, article 8 of the ICC Statute contains a general *chapeau*, which specifies that the Court shall have jurisdiction over war crimes, regardless of the type of conflict, "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."[41] The wording is clearly intended to restrict the Court's reach to situations where war crimes are committed systematically or massively, although fortunately it does not preclude the ICC from examining isolated instances as well. Provisions similarly aimed at curtailing the Court's jurisdiction may be found in the text on war crimes committed in internal armed conflict. The ICC Statute, for example, specifies that the segment on serious violations of the laws and customs applicable in civil strife pertains to situations of "protracted armed conflict between governmental authorities and organized armed groups or between such groups."[42] A separate paragraph proclaims that nothing in the provisions on war crimes in internal conflict "shall affect the responsibility of a Government to maintain or re-establish law and order . . . or to defend the unity and territorial integrity of the State, by all legitimate means."[43] It seems fairly obvious that the exact import of these provisions will depend on how they are interpreted by the Court. It is hoped that the judges will perform their mandate bearing in mind the ICC's primary purpose, which is to punish and deter serious international crimes.

Second, the Rome Statute includes a Transitional Provision (article 124) that will permit a state party to opt-out of the Court's jurisdiction over war crimes committed on its territory or by its nationals for a period of seven years upon ratification of the ICC Statute.[44] The insertion of this provision was the last minute price exacted by the French delegation in exchange for its support of the Rome "package." The provision undermines the goal of ending impunity for war crimes by excluding the Court from the system of jurisdiction that exists over grave breaches of the Geneva Conventions.[45] The effect of the article is to ensure that the ICC will not be able to exercise jurisdiction over war crimes committed by troops or peacekeepers deployed abroad for a period of seven years in a situation where the territorial state might be willing to surrender them to the ICC rather than prosecute them in

40. Compare the corresponding provisions of the April 1998 Draft Statute and the Rome Statute.

41. ICC Statute, *supra* note 1, art. 8(1).

42. *Id.* art. 8(2)(f).

43. *Id.* art. 8(3).

44. *Id.* art. 124.

45. *See, e.g.*, article 146 of the Geneva Convention IV pursuant to which: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." Geneva Convention IV, *supra* note 31. The custodial state does not need the consent of any other state before prosecuting the perpetrators of grave breaches.

a domestic court. It was adopted over great NGO objections and has rightly been called a "license to kill."[46]

The drafters of the ICC Statute overcame a significant hurdle in reaching agreement on a definition of crimes against humanity, which is provided for in article 7 of the Rome treaty. This was no easy task given that there is no accepted definition or list of these crimes as a matter of treaty law. Previous definitions, such as those included in the Nuremberg[47] and Tokyo Charters,[48] Allied Control Council Law No. 10[49] and the Statutes of the Yugoslavia[50] and Rwanda Tribunals,[51]differ both in their elements and in the enumeration of acts considered to constitute crimes against humanity. Drawing from them, the Rome Statute provides that a crime against humanity means any of the following acts mentioned below "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[52] The *chapeau* is important because it omits a nexus to armed conflict, clearly signaling that crimes against humanity may be committed in peacetime. Having in mind the divergence on this issue reflected in preceding definitions,[53] the ICC Statute can be said to represent a step forward in the effort to ensure justice for the victims of such crimes. The ICC Statute also provides that acts constituting crimes against humanity may be committed either as part of a widespread or systematic attack against a civilian population, eliminating the need to prove a cumulation of these elements before the Court can proceed. This aspect of the definition had also been the subject of much contention before and at Rome. Lastly, the definition does not provide that persecution must be the motive for any of the acts listed as crimes against humanity, but instead lists persecution as a separate crime against humanity.[54]

There are also troubling aspects to the article 7 *chapeau* on crimes against humanity. Among them is the introduction of a high evidentiary threshold that will have to be met for the Court to exercise jurisdiction. An attack against a civilian population is defined as "a course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[55] This clarification appears to de facto reintroduce a cumulation of the widespread

46. *See* Open Letter by Amnesty International's Secretary General Urging All Governments to Ratify the Statute of the International Criminal Court as Soon as Possible, AI Index: IOR 40/23/98, Sept. 17, 1998 [hereinafter AI Open Letter].

47. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

48. *See* Charter for the International Military Tribunal for the Far East, Apr. 26, 1946, T.I.A.S No. 1589, 4 Bevans 27.

49. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Crimes Against Humanity, Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, Jan. 31, 1946, *reprinted in* BENJAMIN B. FERENZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 488 (1980).

50. *See* S.C. Res. 827, U.N. Doc. S/RES/827 (1993) [hereinafter Yugoslavia Tribunal Statute].

51. *See* Rwanda Tribunal Statute, *supra* note 38.

52. Rome Statute, *supra* note 1.

53. Thus, for example, the Yugoslavia Tribunal Statute requires a nexus to armed conflict in article 5, whereas the Rwanda Tribunal Statute, in article 3, does not.

54. Once again, the Yugoslavia and Rwanda Tribunal Statutes diverge. While the former does not include persecution in the *chapeau* of article 5, the latter provides it in the *chapeau* to article 3. It should be noted that the Rwanda Tribunal Statute also lists persecutions as a separate crime against humanity, which is curious, to say the least.

55. ICC Statute, *supra* note 1, art. 7(2)(a).

and systematic requirement into the definition of crimes against humanity. Moreover, it is unclear what standard of evidence will be required to prove "knowledge of the attack," an element missing from previous international definitions. Will it suffice that an accused simply knew that the acts he or she committed were part of a broader series of acts, or will the Prosecutor have to prove that the individual perpetrator also personally knew that the acts were committed as part of a policy? Having in mind the difficulty of proving policy decisions taken in small leadership circles, the latter interpretation could make prosecution very difficult.

In an advance over existing law, article 7 of the Rome Statute significantly expands the list of crimes considered to constitute crimes against humanity. It includes murder, extermination, enslavement, deportation and persecution,[56] which were provided for in the Nuremberg Charter. Similar to the Statutes of the Yugoslavia and Rwanda Tribunals, the ICC Statute also provides that imprisonment, torture, and rape are crimes against humanity when committed on a widespread or systematic basis. However, it further broadens the list to include "forcible transfer of population," "other severe deprivation of physical liberty in violation of fundamental rules of international law" (apart from imprisonment), "sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity," "enforced disappearance of persons" and "apartheid."[57] It also defines most of the crimes mentioned above—some for the first time and some differently than in existing international treaties. Thus, torture is more broadly defined than in the Torture Convention[58] because the requirement of official capacity of the perpetrator has been eliminated. On the other hand, the definition of enforced disappearances includes an element of intent that is not found in existing international documents.[59] It may be concluded that a proper evaluation of the ICC Statute's contribution to international law in the area of definitions of crimes against humanity will have to await judicial interpretation.

B. Jurisdiction

The issue of preconditions to the exercise of ICC jurisdiction emerged as the most contentious element of the ICC package at the Rome Diplomatic Conference. In the Lawyers Committee's view it was resolved to the detriment of the future Court's effectiveness and may be said to constitute the greatest weakness of the Rome treaty. Pursuant to the ICC Statute, there are three ways in which the Court's jurisdiction can be triggered: by Security Council referral of a situation to the Prosecutor, by state party referral, or by the Prosecutor

56. Similar to the Nuremberg Charter, which in article 6(c) provided that "persecutions on political, racial or religious grounds" were crimes against humanity when committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal . . ," the ICC Statute also provides that persecution is a crime against humanity when committed "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court." However, the ICC Statute definition expands the grounds for persecution to also include persecution on "national, ethnic, cultural, gender . . . or other grounds that are universally recognized as impermissible under international law." *See id.* art. 7(1)(h).

57. The list of crimes against humanity is open-ended. The court may also exercise jurisdiction over "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." *Id.* art. 7(1)(k).

58. *See* G.A. Res. 39/46, U.N. GAOR, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, *available in* Human Rights, A Compilation of International Instruments, Universal Instruments, 293–94 (1993).

59. *See, e.g.*, Art. II Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, 33 I.L.M. 1529 at 56.

acting on his or her own motion.[60] When the Security Council triggers the Court's jurisdiction, the ICC will be able to open an investigation without any preconditions, that is, without obtaining the consent or agreement of any state, party or nonparty to the ICC Statute. The Court's jurisdiction will be exercised in a manner similar to that of the two ad hoc Criminal Tribunals for the former Yugoslavia and Rwanda.

The problem arises in proceedings that are initiated by a state party to the Statute or by the Prosecutor acting on his or her own motion. When those triggers are used, the Court will be able to open an investigation only if the situation involves conduct that occurred on the territory of a state that has accepted the Court's jurisdiction or was committed by the national of such a state.[61] A state accepts the Court's jurisdiction either by ratifying the ICC Statute (automatic jurisdiction[62]) or by filing an ad hoc declaration accepting the Court's authority to proceed with respect to the crime in question.[63] A hypothetical example may be used to clarify this mechanism. If a Scandinavian country that is a state party to the ICC Statute, or the ICC Prosecutor acting on his or her own motion, decided to initiate proceedings involving the recent events in Rwanda or Kosovo, the ICC would have to ascertain whether Rwanda or the Federal Republic of Yugoslavia had ratified the ICC Statute or had given their consent to the Court's jurisdiction on an ad hoc basis before opening an investigation. If that was not the case, the Court could not proceed.[64]

It seems fairly clear that the jurisdictional regime provided for in the ICC Statute will severely limit the Court's ability to react to most situations of serious crimes unless proceedings are triggered by the Security Council. There are two possible ways of overcoming this structural weakness. The first is by ensuring universal ratification of the treaty, because ratification of the ICC Statute confers automatic jurisdiction on the ICC. The second is to strive for amendments to the Rome Statute that would enable the custodial state or the state of nationality of the victim to serve as additional jurisdictional links allowing the Court to proceed. The recent Pinochet case may be used to clarify this point. Under the ICC Statute's provisions on preconditions to the exercise of jurisdiction the Prosecutor would not be able to open an investigation against the former Chilean dictator unless Chile, as the territorial state and the state of nationality of the perpetrator, had ratified the ICC Statute or had given its consent to ICC jurisdiction on an ad hoc basis. If, however, the custodial state had been provided as an additional jurisdictional link, U.K. ratification of the ICC Statute or its ad hoc acceptance of the Court's jurisdiction would have allowed the Court to move forward if the proceedings against Pinochet had been initiated by a state party to the ICC Statute or by the Prosecutor acting *proprio motu*. The same effect would

60. *See* ICC Statute, *supra* note 1, art. 13.

61. *See id.* art. 12(2).

> In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
>
> (b) The State of which the person accused of the crime is a national.
>
> *Id.*

62. *Id.* art. 12(1).

63. *See id.* art. 12(3).

64. Both this hypothetical case and the one mentioned below are based on the assumption that the ICC Statute was in force when the crimes were committed. It is important to note that pursuant to article 11, the ICC will in fact not have retroactive jurisdiction.

have been produced if the state of nationality of the victim had been included as a jurisdictional link in the ICC Statute. Spain's consent, as the state of nationality of some of Pinochet's victims, either by ratification or on an ad hoc basis, would have sufficed to permit an ICC investigation.

The omission of the custodial and state of nationality of the victim from the ICC Statute is all the more unfortunate because the majority of delegations at the Rome Conference had favored their inclusion.[65] As may be concluded, the drafters of the ICC treaty not only rejected the proposal that the ICC be granted universal jurisdiction over genocide, war crimes and crimes against humanity[66] but provided it with weaker jurisdictional authority than any state has under current international law.[67] Given that the ICC is being created by the collective will of many states,[68] it is impossible to logically explain why it should have less power than each of them individually. On this issue, politics simply prevailed.

C. Prosecutorial Powers

Contrary to initial predictions, the ICC does lay down the procedure for the initiation of proceedings by the Prosecutor acting on his or her own motion (*proprio motu*).[69] The Prosecutor's authority to do so was the most controversial aspect of the Court's trigger mechanism and was one element of the ICC package that had to be resolved before the Statute could be assured of adoption. Both opponents and proponents of the Prosecutor's *proprio motu* powers—and the chasm was very wide—agreed that the inclusion or absence of such powers would fundamentally affect the ICC's structure and functioning. The idea was considered so radical at the start of the ICC process that the ILC had not even provided for it in the 1994 Draft Statute.

Under the ILC Draft Statute the Court's jurisdiction was triggered either by the Security Council[70] or by a state party to the ICC Statute,[71] with no provision for independent prosecutorial action. In fact, the commentary to the ILC Draft Statute mentions that only one member of the ILC suggested that the Prosecutor should be able to initiate an investigation in the absence of a complaint. Other members felt that investigations should not be undertaken without state party or Security Council support, "at least not at the present stage of development of the international legal system."[72] Negotiations on the ICC Statute held

65. *See Special Report of the NGO Coalition for an International Criminal Court*, The Rome Treaty Conference Monitor, July 10, 1998. According to this report, 79 percent of states that had taken part in a debate within the Committee of the Whole several days before the close of the Rome Conference favored the proposition that the custodial and state of nationality of the victim should, along with the territorial state and state of nationality of the perpetrator, provide a jurisdictional link for ICC proceedings.

66. The German delegation championed the proposal on universal jurisdiction in the negotiations leading up to the Rome Diplomatic Conference. Under a German proposal, the ICC would have universal jurisdiction over the crime of aggression as well, which was one of the reasons the text was easily eliminated once the Rome Conference got underway. *See April 1998 Draft Statute*, *supra* note 8, at 33.

67. Under current international law, universal jurisdiction and jurisdiction based on the nationality of the victim are well-established principles. *See* L. Henkin et al., International Law: Cases and Materials 1049 (1993).

68. *See* ICC Statute, *supra* note 1, art. 126. Pursuant to art. 126, 60 ratifications are required for the ICC Statute's entry into force.

69. *See id.* art. 15.

70. *See ILC Draft Statute*, *supra* note 7, art. 23(1).

71. *See id.* art. 25.

72. *Id.* at 90.

within the Ad Hoc and Preparatory Committees disproved the ILC's view insofar as a proposal aimed at ensuring *proprio motu* powers were included in the 1996 text of the Draft Statute.[73]

When the last Preparatory Committee session was held in March-April 1998, it was clear that there were still two solid positions on the issue of *proprio motu* powers. One group of countries, primarily the "like-minded," were of the view that the ICC should have an independent Prosecutor if the Court was to be effective in punishing and deterring serious crimes. Their rationale was that without *proprio motu* powers, the Court would be prevented from acting in situations where, for political or other reasons, neither a state party nor the Security Council were willing or able to initiate proceedings. The position of this group was that the Prosecutor should be authorized to trigger the Court's jurisdiction on his or her own motion and that the first check on prosecutorial action should take place at the stage of confirmation of the indictment.[74] The second group of countries based their opposition to prosecutorial independence on concerns about the risks of politically motivated or frivolous *proprio motu* proceedings. They interpreted prosecutorial independence to mean that the Prosecutor should have full freedom to decide whom to investigate once the Court's jurisdiction was triggered by a state party or the Security Council, but that the Prosecutor should not be granted separate *proprio motu* triggering powers.[75]

Given the depth of the opposition to an independent Prosecutor it was evident that the fear of states in the second group would have to be addressed by means of additional checks on prosecutorial power if the proposition of a *proprio motu* Prosecutor were to stand any chance of success. A compromise solution that provided the basis for what eventually became article 15 of the Rome Statute, was introduced in March 1998.[76] The proposal laid out sources that could submit information on the commission of a crime to the Prosecutor and the Prosecutor's right to seek additional information from other sources. Most importantly, it obliged the Prosecutor to seek authorization from the Pre-Trial Chamber before proceeding with a *proprio motu* investigation, thus introducing early judicial review of proceedings initiated on the Prosecutor's own motion. The text also specified the criteria that would guide the Pre-Trial Chamber in authorizing the commencement of an investigation.

It is submitted that the inclusion of *proprio motu* powers for the ICC Prosecutor is what truly enables the new international body agreed upon in Rome to be characterized as a criminal court. Without an independent Prosecutor the ICC's jurisdiction could have been triggered only by political bodies, that is, by states parties and the Security Council. This would have been detrimental to the court's independence and effectiveness, and therefore credibility, in the long term. For NGOs, who lobbied hard for a Prosecutor with *proprio motu* powers, it was important that the check on prosecutorial discretion that was eventually included in the ICC Statute was judicial and not political in nature.[77]

73. *See Preparatory Committee Report II, supra* note 15, arts. 25, 109.

74. *See* ICC Statute, *supra* note 1, art. 61. The term indictment was dropped in later drafting work so the Statute, as finally adopted, refers to the "confirmation" of charges. *See id.*

75. *See CICC Report on the March-April 1998 Session of the Preparatory Committee on the Establishment of an International Criminal Court*, NGO Coalition for an International Criminal Court (1998) 23, 24.

76. *See Proposal Submitted by Argentina and Germany*, art. 46, U.N. Doc. A/AC.249/1998/WG.4/DP.35 (1998).

77. An especially strong stand against *proprio motu* powers was enunciated in a speech delivered on behalf of the U.S. delegation. *See The Concerns of the United States Regarding the Proposal for a Proprio Motu Prosecutor*, June 22, 1998. For a rebuttal of U.S. claims, see Lawyers Committee for Human Rights, *Response to U.S. Concerns Regarding the Proposal for a Proprio Motu Prosecutor*, June 24, 1998 (both documents on file with author).

D. Security Council Role

The Rome Statute empowers the U.N. Security Council to prevent or stop an ICC investigation or prosecution for a renewable period of twelve months by means of a resolution adopted under Chapter VII of the U.N. Charter.[78] It defines one aspect of a basically three-pronged relationship between the Court and the Security Council: apart from the power to defer proceedings, the Council can also trigger the Court's jurisdiction[79] and serve as an enforcement mechanism.[80] Article 16 had an extraordinary drafting history, reflecting the widely divergent views expressed throughout the ICC process on the appropriate link, if any, between the Court as a judicial body and the Security Council as a political organ. While NGOs supported the position that the Security Council should not be able to defer ICC proceedings, the compromise struck at Rome completely reversed the ICC-Security Council relationship as initially provided for.

The 1994 ILC Draft Statute basically subordinated the Court to the Security Council by requiring the ICC to seek Security Council approval for the initiation of proceedings.[81] As envisaged by the ILC, the burden was on the Court to monitor the Security Council's agenda in order to determine whether it could go forward with a prosecution. During the ICC process, three views on this supremely political issue emerged. According to the first, the Security Council's power to permit ICC proceedings had to be retained as an acknowledgment of the Council's primary responsibility for the maintenance of international peace and security under article 24 of the U.N. Charter.[82] Pursuant to the second view, the Council's ability to veto ICC proceedings would be an unacceptable infringement on the Court's independence. The third view was that some safeguard for the Charter position of the Security Council should be preserved, but not as broad in scope as provided for in the ILC Draft Statute. The breakthrough came in August 1997 when a proposal reversing the ICC-Security Council relationship was introduced.[83] Under that text, which became the basis for article 16, the Council would be allowed to defer proceedings, but not to approve them from the start.

The importance of the reversal is that it allows the Court to proceed if only one permanent Security Council member objects to the issuance of a Chapter VII resolution requesting deferral, and requires deferral to be sought by means of a formal resolution. Because of the public nature of such a resolution, and most likely, the public nature of the crimes that the Court will be asked to refrain from addressing, deferral will be politically

78. *See* ICC Statute, *supra* note 1, art. 16, "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions." *Id.*

79. *See id.* art. 13(b).

80. *See id.* art. 87(7).

81. *See ILC Draft Statute*, *supra* note 7, art. 23(3), " No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the U.N. Charter, unless the Security Council otherwise decides." *Id.*

82. *See* U.N. Charter, art. 24(1), "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." *Id.*

83. *See Proposal by Singapore on Article 23*, Non-Paper/WG.3/No. 16 (Aug. 8, 1997).

hard to justify. On the other hand, it is also obvious from the wording of article 16 that Council agreement on deferral, once reached, may be extended indefinitely for twelve month intervals. Given that the Security Council does not have similar sway over either the International Court of Justice[84] or national courts, its power to defer ICC proceedings cannot be legally justified. Once again, political considerations prevailed. While like-minded government and NGO efforts aimed at completely eliminating Security Council control over the Court's docket failed, it is no small success that the Council's involvement was seriously curtailed.

E. Justice for Women and Victims

The ICC Statute's codification of sexual and gender crimes and its inclusion of mechanisms and structures to ensure the investigation and prosecution of such crimes represents a crucial advance over existing law. Another significant step forward are the treaty's provisions on reparations to victims of crimes and their families. The recognition of both sets of issues in the Statute is in no small part due to the targeted lobbying efforts of the Women's Caucus for Gender Justice in the ICC.[85]

As already mentioned, the ICC Statute includes provisions that explicitly categorize certain acts as crimes perpetrated against women. It provides that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence is a war crime whether committed in international or noninternational armed conflict, and that these acts may constitute crimes against humanity as well. The expanded list of bases for persecution as a crime against humanity includes, among others, persecution against any identifiable group or collectivity based on gender. The crime of enslavement, which is defined as the exercise of the powers attaching to the right of ownership over a person, includes the exercise of such power "in the course of trafficking in persons, in particular women and children."[86] The most hotly debated issue in this context throughout the ICC negotiations leading up to Rome and at Rome was the definition of "forced pregnancy." States opposed to its inclusion argued that the definition might be used to undermine domestic pro-life laws. While forced pregnancy was eventually provided for in the ICC Statute as both a war crime and a crime against humanity, the final text reflects the underlying definitional struggles.[87]

The ICC Statute also lays down important procedural safeguards aimed at ensuring the effective investigation and prosecution of sexual and gender crimes. It provides that the need for "a fair representation of female and male judges" shall be taken into account by

84. The Lockerbie judgment is expected to shed more light on this aspect of the Security Council-ICJ relationship.

85. *See* The Center for Reproductive Law and Policy, The International Criminal Court: Ending Impunity for Reproductive Rights Involving Sexual Violence, Oct. 1998. For a comprehensive review of the ICC Statute's provisions on sexual and gender crimes, and an explanation of the definition of "gender" included in the ICC Statute, see Barbara Bedont & Katherine Hall Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, Brown J. World Aff. (1999).

86. *See* ICC Statute, *supra* note 1, art. 7(2)(c).

87. "Forced pregnancy," which is listed as both a war crime and a crime against humanity, is defined as "the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy." *See id.* art. 7(2)(f).

states parties in the selection of judges[88] and that the need to include judges with legal expertise on specific issues "including, but not limited to, violence against women or children" shall also be recognized.[89] The ICC Statute also obliges the Prosecutor and Registrar to apply these criteria in the employment of their staff[90] and mandates the creation of a Victims and Witnesses Unit within the Registry. The Unit is charged with providing protective measures, security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. As explicitly stated, the Unit "shall include staff with expertise in trauma, including trauma related to crimes of sexual violence."[91] The ICC Statute obliges the Prosecutor to take appropriate measures for the protection of victims and witnesses, having regard to factors such as age, gender and the nature of the crime "in particular, but not limited to, where the crime involves sexual or gender violence or violence against children." Importantly, it adds that these measures "shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[92]

In a groundbreaking development, the Rome treaty also includes provisions on reparations to victims and their families.[93] The Court may, either upon request or on its own motion (in exceptional circumstances), determine the scope and extent of any damage, loss and injury to, or in respect of victims. It is authorized to order that a convicted person make reparations to victims or their families, which may include restitution, compensation and rehabilitation. Before making such an order the Court is obliged to take account of representations by, or on behalf of the convicted person, victims, other interested persons or interested states. The Statute provides for the establishment of a Trust Fund from which victims may be compensated[94] and permits the Court to order the seizure of property or assets of the convicted person, or of the property used to commit the crime.[95] States parties are obliged to implement a Court decision to that effect. It should be noted that the Statute's provisions on reparations will be further elaborated in the ICC's Rules of Procedure and Evidence.

F. Cooperation and Enforcement

As opposed to the ad hoc Criminal Tribunals for the former Yugoslavia and Rwanda that were established by Security Council resolution and therefore have primacy over national courts,[96] the ICC will be complementary to national criminal jurisdictions.[97] The principle of complementarity, which is reflected in a series of articles, means that the ICC will be able to exercise jurisdiction only when a national criminal justice system is "unwilling or unable genuinely" to investigate and prosecute a crime that is otherwise within the Court's jurisdiction.[98] The ICC Statute allows the principle to be invoked by interested states—

88. *See id.* art. 36(8)(a)(iii).
89. *See id.* art. 36(8)(b).
90. *See id.* art. 44(2).
91. *See id.* art. 43(6).
92. *See id.* art. 68(1).
93. *See id.* art. 75.
94. *See id.* art. 79.
95. *See id.* art. 93(1)(k).
96. *See* Yugoslavia Tribunal Statute, *supra* note 50, art. 9, and Rwanda Tribunal Statute, *supra* note 38, art. 8.
97. *See* ICC Statute, *supra* note 1, art. 1.
98. *See, e.g., id.* arts. 17–19.

not just parties to the ICC Statute—and by individuals who are suspected or have been accused of crimes.[99] The standards for a finding of unwillingness or inability are quite high,[100] underscoring the fact that the ICC is not intended to replace functioning judicial systems, but to provide an alternative to impunity in situations where national courts fail to fulfill their primary task. This relationship between the ICC and domestic authorities clearly shows that state party cooperation will be crucial to the Court's effective functioning in practice.

The ICC Statute's provisions on international cooperation and judicial assistance reflect the hard bargain that was struck in Rome as well as its imperfections. Their exact bearing on the Court's functioning will be known once the Court becomes operational and the ICC's Rules of Procedure and Evidence have been elaborated. The ICC Statute spells out a general duty of state parties to cooperate[101] and obliges them to "ensure that there are procedures available under their national law for all of the forms of cooperation which are specified" in the part of the ICC Statute dealing with state cooperation.[102] Some of these procedures, however, are likely to be complicated and could lead to delays in effective state party assistance to the ICC. An example is the provision requiring states parties to comply with ICC requests for the surrender and transfer of persons "in accordance with the provisions of this Part [of the Statute on international cooperation] and the procedure under their national law."[103] Given that the ICC Statute does not include grounds for refusal to surrender similar to those existing under bilateral extradition treaties, it will be important that states parties refrain from applying those procedures when complying with ICC requests. The ICC Statute reinforces this view by explicitly defining the difference between "surrender" and "extradition" in article 102.[104]

While the 1994 ILC Draft Statute had no provisions for dealing with situations of a state party's failure to cooperate with the ICC, the Rome treaty does include a two-pronged mechanism as a result of NGO lobbying. Where a state party fails to comply with a request to cooperate contrary to the provisions of the ICC Statute, thereby preventing the Court from fulfilling its mandate, "the Court may make a finding to that effect and refer the matter to the Assembly of States Parties."[105] The effect of this provision is, first, to enable the ICC to make a public finding of noncompliance, drawing international attention to the state party's contravention of an international obligation. Second, it enables the Assembly to determine what measures should be taken, individually or collectively, by the states parties, to bring the recalcitrant state into compliance. There is nothing to prevent the Assembly from bringing the matter to the attention of appropriate U.N. organs, including the Security Council, for further action. The second prong of the compliance mechanism is that an ICC finding of non-cooperation may be brought before the Security Council in cases where proceedings were initiated by a Security Council referral. While, once again, there is no guarantee that the Council will act, a legal basis for any measures it might

99. *See id.* arts. 18(1), 19(2).

100. *See id.* art. 17(2), (3).

101. *See id.* art. 86.

102. *See id.* art. 88.

103. *Id.* art. 89(1).

104. Article 102 reads: "For the purposes of this Statute: (a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute, (b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation." *Id.* art. 102.

105. *See id.* art. 87(7).

decide to impose is provided for in the ICC Statute. Similar to other provisions, the state cooperation and compliance regime can be fully assessed only after the Court becomes operational.

IV. Going Forward

The adoption of the Rome Statute, momentous as it was, is just the half-way point in the creation of a permanent ICC. The ICC Statute provides that sixty ratifications must be obtained before its entry into force, which means that a global ratification campaign must be the next target of NGO lobbying efforts. Given that sixty ratifications is a high number compared to that required for most other international treaties, NGOs and like-minded governments must work hard to ensure that the momentum is not lost and that the treaty comes into effect as soon as possible.[106] Over the next year two other documents relevant to the Court's establishment must be drafted; the ICC's Rules of Procedure and Evidence and the Elements of Crimes provided for in article 9 of the treaty.[107] Pursuant to the Final Act of the Rome Diplomatic Conference, the draft texts of these documents should be finalized by a Preparatory Commission for the ICC.[108] The Rules of Procedure and Evidence will spell out the practical details of the Court's functioning, while the Elements of Crimes are intended to further specify the definitions of crimes within the Court's jurisdiction. Even though these tasks may seem technical, it will be important to preempt attempts to restrict the Court's effectiveness during the preparation of the Rules and Elements. NGO participation in the forthcoming sessions of the Preparatory Commission will be directed toward that goal.

Another important NGO aim will be to prevent any attempt at reopening the text of the ICC Statute before it comes into force. It is anticipated that the United States might lead such an effort at the forthcoming sessions of the Preparatory Commission with a view towards "fixing" a jurisdictional regime that it considers flawed.[109] U.S. opposition to the

106. As of this writing, the first country to ratify the ICC Statute was Senegal. *See* Senegal First State to Ratify Rome Statute of International Criminal Court, U.N. Press Release, L/2905, Feb. 3, 1999.

107. Pursuant to article 9(1): "Elements of Crimes shall assist the Court in the interpretation and application of articles 6 [genocide], 7 [crimes against humanity], and 8 [war crimes]. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties." ICC Statute, *supra* note 1, art. 9(1).

108. *See* Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex 1, Res. F, U.N. Doc. A/CONF.183/10 (1998). The Preparatory Commission will be open to all states that have signed the Final Act and other states that had been invited to participate in the Diplomatic Conference. It is charged with finalizing the draft texts of the ICC's Rules of Procedure and Evidence and the Elements of Crimes by June 30, 2000. Both documents will be adopted by the Assembly of States Parties. *See* ICC Statute, *supra* note 1, arts. 51(1), 9(1).

109. December 8, 1998 U.S. statement to the U.N. General Assembly, made when the G.A. was adopting a resolution (U.N. Doc. A/RES/53 105, Jan. 26, 1999) providing for the convening and timetable of work of the Preparatory Commission, supports this view. The pertinent part of the statement reads:

> The United States joined consensus on this resolution in significant part because the fourth operative paragraph provides an opportunity during the Preparatory Commission for a serious discussion on ways to enhance effectiveness and acceptance of the Court among governments. To be fruitful, that effort should enable a process to unfold resulting in a treaty that can attract our support and that of other governments representing large and diverse parts of the global population. We believe the effectiveness and acceptance of the Court will depend to significant degree on the definition of the Court's jurisdiction and whether the Court addresses the concerns of a wide range of governments.

U.S. Statement on Agenda Item 153 on December 8, 1998, before the U.N. General Assembly (on file with author). The key portion of the statement is the one referring to a "process" that would "unfold resulting in a

ICC Statute centers on article 12, which establishes preconditions to the exercise of ICC jurisdiction in cases where proceedings have not been triggered by the Security Council. The United States believes that the Court should be authorized to act when an investigation has been opened as the result of state party referral or by the Prosecutor acting *proprio motu* only if the accused's state of nationality has accepted the Court's jurisdiction.[110] The underlying rationale of this proposal, which would obviously cripple the Court, is to ensure that no U.S. national can be brought before the ICC unless the United States specifically consents to the Court's jurisdiction either by ratification or on an ad hoc basis. The problem is that acceptance of the U.S. proposal would give all states the same ability to prevent ICC proceedings, thereby rendering the Court meaningless.

As the last hours of the Rome Conference were running out the United States presented a final jurisdictional proposal, pursuant to which the consent of the accused's state of nationality would be required only if that state claimed that the alleged crime was committed "in the course of official duties."[111] To use the example of the Gulf War, this would mean that if the treaty had been in force, Iraq could have prevented ICC jurisdiction over crimes committed by its soldiers on Kuwaiti soil by alleging that they were committed in the course of official duties. The fact that Kuwait, as the territorial state, might want the Court to exercise jurisdiction, would be of no relevance. The "official acts" approach is even more problematic than a direct requirement of consent from the state of nationality of the accused. The dichotomy it creates between state-sanctioned and non-state-sanctioned crimes contravenes the well-established principle that official position or government orders cannot be used as a defense to international criminal responsibility.[112] It also blurs the distinction between individual and state responsibility, and primarily benefits rogue nations who could always interpose the "official acts" claim to any ICC action. As has already been mentioned, the ICC's jurisdictional regime is the weakest part of the Rome Statute. Further dilution of the corresponding provisions would seriously undermine the purpose of the treaty, which is to "put an end to impunity for the perpetrators" of crimes within the Court's jurisdiction and "to contribute to the prevention of such crimes."[113]

Any reopening of the Rome treaty undertaken after the ICC Statute comes into force should, in fact, be aimed at strengthening the Court's independence and effectiveness. While the exact scope of the provisions that might need to be amended to meet that aim will be known once the Court is operational, there are several parts of the ICC Statute that are clearly deficient as currently drafted. The first is precisely article 12 on preconditions to exercise of jurisdiction. It should be modified to include the custodial state and the state of nationality of the victim as jurisdictional links that would allow the Court to proceed when a state party or the ICC Prosecutor trigger the Court's jurisdiction. Ideally, the ICC Statute should provide for universal jurisdiction, which would mean the elimination of any preconditions to the opening of a non-Security Council-triggered investigation. It is the only way in which the Court would enjoy the same jurisdictional prerogatives as states do under international law.

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treaty," which is formulated as if the treaty were not already adopted. The statement also singles out the jurisdictional regime as needing further "definition."

110. *See Proposal Submitted by the United States of America*, U.N. Doc. A/CONF.183/C.1/L.70 (1998).

111. *Proposal Submitted by the United States of America*, U.N. Doc. A/CONF.183/C.1/L.90 (1998).

112. *See, e.g.*, Nuremberg Charter, *supra* note 47, arts. 7–8.

113. ICC Statute, *supra* note 1, preamble.

The seven year "opt-out" regime provided for war crimes under article 124 is another troublesome part of the ICC Statute. It is hoped that this "Transitional Provision" will be omitted from the ICC Statute at the first Review Conference, which is when an examination of article 124 is scheduled to take place. Until then, efforts should be made to publicly shame states into not making the opt-out declaration on war crimes when ratifying the ICC Statute. The United Nations should refuse to enlist as peacekeepers troops from countries that deposit an opt-out clause. It should also request states that are not party to the treaty to consent on an ad hoc basis to the Court's jurisdiction if their troops are involved in peacekeeping missions.[114]

Finally, article 98 should be deleted from the ICC Statute. This provision, which did not exist as a drafting proposal until the very last days of the Rome Conference, permits non-states parties to prohibit the transfer of their nationals to the Court by means of bilateral agreements to that effect with other states.[115] The intent of this provision is to shield the citizens of non-states parties from ICC jurisdiction in situations where the territorial state, or the territorial and custodial states, as parties to the ICC Statute or states that have consented to the ICC's jurisdiction on an ad hoc basis, would be willing to surrender them to the ICC. It is obvious that the bilateral agreements provided for would be concluded in order to circumvent ICC jurisdiction, thereby defeating the very purpose of the Court.

V. Conclusion

The ICC Statute is a complex document that reflects the many political and legal battles that preceded its adoption in Rome. While the treaty did not fully meet NGO demands, the Lawyers Committee and other organizations concluded that, on balance, it deserved their support. It creates, for the first time in history, a permanent international framework to end impunity for international crimes. With sufficient political will—which is required for the success of any international institution—it can prove to be effective in punishing and deterring international crimes. Also, it may well be that the ICC's strength will not lie in the number of persons it brings to justice, but in the indirect effect that its existence will have on states. If the ICC spurs them to effectively fulfill their primary obligation of prosecuting the perpetrators of international crimes the Court will have achieved its purpose.

The adoption of the ICC Statute also signals a significant shift in international attitudes toward serious international crimes. It is proof of a growing awareness that genocide, war crimes and crimes against humanity hurt not only the direct victims of such acts, but the values of the international community. The next step is to ensure, by early ratification and subsequent improvements to the Rome treaty, that the Court is practically able to defend them.

114. These ideas were originally proposed by Amnesty International. *See* AI Open Letter, *supra* note 46, at 2.

115. Article 98(2) reads: "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender." ICC Statute, *supra* note 1, art. 98(2). Paragraph 1 of the article, which requires the court to obtain a waiver of state or diplomatic immunity from a nonstate party is also extremely troubling. It is unclear how this article will be interpreted by the court in light of explicit provisions on the irrelevance of immunities that may attach to the official capacity of a person under article 27(2) of the ICC Statute.